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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Section 4(b) of the Administrative Procedure Act requires an agency to provide "a concise general statement of . . . basis and purpose" for rules it adopts. In this case the court upheld the agency's statutory authority to adopt the rule under review and acknowledged its understanding of the agency's stated reasons for adopting the rule. The question presented is whether section 4(b) nevertheless enables the court to vacate the rule solely because the agency did not also explain (i) how its stated reasons were consistent with the statute being administered, or (ii) why it did not decide to implement the statute differently.

* * * *

If certiorari is granted on the foregoing question, petitioner requests the right to argue the following question, but does not include this question among the reasons for granting the writ:

Whether the Secretary of Transportation provided an adequate statement of basis and purpose for her rule allowing oil tankers built with the aid of government subsidies to shed their domestic trading restrictions by repaying the subsidies in accordance with a formula previously approved by this Court.

LIST OF PARTIES

The following parties appeared in the proceedings below:

Defendant-Appellees

Atlantic Richfield Company (Petitioner herein)
United States of America
Elizabeth Hanford Dole, Secretary of Transportation
Moore McCormack Bulk Transport, Inc.*
Yeon Shipping Corporation *
American Petrofina, Inc.

Plaintiff-Appellants

Independent U.S. Tanker Owners Committee
Overseas Shipholding Group, Inc.
First Attransco Tanker Corp.
Second Attransco Tanker Corp.
Third Attransco Tanker Corp.
American Trading Transportation Company, Inc.
Alaska Bulk Carriers, Inc.
Cove Maritime Companies, Inc.
Crest Tankers, Inc.
Falcon Carriers, Inc.
Sun Transport, Inc.
Trinidad Corp.
Victory Carriers, Inc.
Seatrain Lines, Inc.

Petitioner believes that the parties designated by an asterisk (*) do not have an interest in the outcome of the proceedings in this Court. All other parties to the proceedings below remain parties to the proceedings in this Court.

RULE 28.1 LISTING

Petitioner Atlantic Richfield Company is a publicly-held corporation. A list of its subsidiaries and affiliates that are not wholly owned is set forth in the Appendix, at p. 44a.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner Atlantic Richfield Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in *Independent U.S. Tanker Owners Committee v. Dole* on January 16, 1987.

OPINIONS BELOW

The opinion and order of the court of appeals is reported at 809 F.2d 847 and is reprinted in the Appendix, at p. 2a. The memorandum decision and order of the United States District Court for the District of Columbia (Jackson, D.J.) is reported at 620 F. Supp. 1289 and is reprinted in the Appendix, at p. 16a.

JURISDICTION

The court of appeals entered its judgment on January 16, 1987. It denied timely petitions for rehearing on March 24, 1987. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 553(c) (1982), provides in relevant part:

> After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

STATEMENT OF THE CASE

This case involves judicial review of informal rulemaking by the Secretary of Transportation. The district court's jurisdiction was based on 28 U.S.C. §§ 1331, 1333, 1337, 1651 and 2201-02 (1982).

Background. Section 506 of the Merchant Marine Act, 1936 requires the owner of a merchant vessel built with construction-differential subsidy (CDS) to agree not to operate the vessel in the domestic trade except pursuant to temporary permissions granted by the Secretary of Transportation. In *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980), the Court held that the Secretary has statutory authority to agree to the permanent removal of this domestic-trading restriction upon full repayment of the unamortized portion of the CDS plus interest. The Court observed that such repayment, reflecting the additional capital costs that would have been incurred had no subsidy been available, places the once-subsidized vessel on an equal footing with those already operating in the domestic trade. 444 U.S. at 589-90. The decision below represents the court of appeals' second rejection, on procedural grounds, of regulations implementing the authority confirmed in *Seatrain*.

The first case involved a rule that prescribed certain conditions that an applicant for repayment had to satisfy before it could apply for repayment and listed factors the agency would consider in passing upon the application. After concluding that the rule was within the agency's discretion from a substantive standpoint, the court of appeals vacated the rule for failure to provide the concise general statement of basis and purpose required by section 4(b) of the APA.

Reasoning that an agency's statement of basis and purpose should enable the reviewing court "to see what major issues of policy were ventilated by the informal proceeding and why the agency reacted to them as it did," the court faulted the agency for merely stating that it had considered the comments received in the rulemaking proceedings rather than discussing or responding to them. *Independent U.S. Tankers Committee v. Lewis*, 690 F.2d 908, 918-19 (D.C. Cir. 1982). The court remanded with instruction for new rulemaking proceedings, but ruled that the single large tanker that had been allowed permanent entry into the domestic trade pursuant to the rule would "do no harm" in the interim given the shortage of tankers in the trade. *Id.* at 931.

The Case Below. The present case involves the rule adopted following that remand. Unlike the earlier rule, the new rule did not establish substantive criteria for evaluating repayment applications on a case-by-case basis. Rather, the agency, after evaluating the domestic tanker industry, designated a one-year period during which any of the existing 29 subsidized tankers could permanently enter the domestic trade by making full repayment of the unamortized portion of its CDS plus interest.

In adopting the rule, the agency explained (1) that in its view the statutory objectives of maintaining an adequate domestic merchant fleet would be assured only if the fleet were encouraged to be efficient and competitive;

(2) that restrictions against market entry by the larger and relatively efficient subsidized tankers had resulted in artificially high domestic shipping rates; (3) that allowing market forces rather than periodic exercises of government discretion to decide which of the subsidized tankers would enter the domestic trade would increase the competitiveness of the fleet and reduce transportation costs; and (4) that the Court, in *Seatrain*, had confirmed that permanent domestic operation upon full CDS repayment was not only consistent with the purposes of the Merchant Marine Act but was preferable to *de facto* government regulation of domestic capacity through periodic discretionary permissions. 48 Fed. Reg. 4409-10 (App. 37a-42a); 50 Fed. Reg. 19,172-78 (App. 33a-35a).

The rule became effective June 6, 1985. On October 25, 1985, the district court upheld the rule, concluding that the "record . . . speaks to all the [plaintiffs'] concerns," and that "the Secretary's reasoning is clear, whether or not it will prove to have been correct, and . . . the payback rule rationally follows from that reasoning." App. 26a & 31a.

During the rule's one-year payback period, ending June 6, 1986, only three subsidized tankers repaid their subsidies and entered the domestic trade. Two of those tankers are owned by petitioner, which paid the government $86.5 million in exchange for permanent removal of the domestic trading restrictions.

By its January 1987 opinion the court of appeals upheld the agency's statutory authority to adopt a rule allowing any subsidized tanker to enter the domestic trade upon full CDS repayment, but again concluded that the agency's statement of basis and purpose for the rule was inadequate. Although the court acknowledged its understanding of the agency's reasons for adopting the rule,[1]

[1] In parts I and II of its opinion, the court, in upholding the agency's statutory authority to issue the rule, noted that the rule

it held that the rulemaking was procedurally deficient because the agency failed to explain how encouraging efficiency and competition free of unnecessary regulation was consistent with or implicit in the statutory objective of promoting the domestic merchant fleet. App. 14a.

The court required this explanation despite its own previous recognition that (i) the statute had been enacted in part to promote an "efficient merchant fleet";[2] (ii) the agency was obligated "to minimize interference with the free market forces normally at work in the domestic trade";[3] and (iii) this Court held in *Seatrain* that full CDS repayment with interest eliminates the sole reason for regulation of subsidized shipping capacity in the domestic trade.

Because it found that the lack of such explanation was "quite serious and rais[ed] considerable doubt about which of the proposed [sic] alternatives [to the rule] would best serve" the statutory objectives, the court elected not to remand for a fuller explanation, but to vacate the rule entirely. App. 15a. It withheld issuance of its mandate for six months, however, "to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade." *Id.*

Subsequent Events. On April 15, 1987, the Maritime Administration published a new Notice of Proposed Rulemaking. 52 Fed. Reg. 12,199. The proposed rule, if adopted and upheld in the inevitable court challenge,

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was designed to address the problems of overcapacity in the foreign trade and the shortage of larger tankers in the Alaska trade. App. 4a-5a. It also noted that the rule provided a better solution to these problems than did the agency's previous remedy of granting discretionary permissions for temporary domestic operation of subsidized tankers. App. 7a-8a.

[2] *American Trading Transp. Co. v. United States*, 791 F.2d 942, 944 (D.C. Cir. 1986).

[3] *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 U.S. 908, 917 (D.C. Cir. 1982).

would allow the four tankers that repaid their subsidies under the two vacated rules to remain eligible for domestic operaion. On March 25, 1987, however, the House Committee on Appropriations reported a supplemental appropriations bill which would prohibit the agency from using appropriated funds to adopt the newly proposed rule or to participate in any judicial proceedings involving the issue of CDS repayment.[4]

REASONS FOR GRANTING THE WRIT

The court of appeals' decision is based upon a view of administrative law that is fundamentally at odds with the precepts prescribed by Congress and this Court. Here this incorrect view enabled the court to frustrate the agency's decade-long effort to implement a major element of maritime policy. If uncorrected, it will enable reviewing courts generally to reverse other policy decisions that fully comply with governing statutes.

Unquestionably the court below understood the reasons given by the agency in adopting the rule under review. It refused to decide whether those reasons constituted an irrational policy choice that was inconsistent with the governing statute (as those challenging the rule had argued). Instead, the court vacated the rule because the agency had not itself explained, to the court's satisfaction, why the agency believed its reasons to be consistent with the statute. Such an expansive view of the procedural requirement for a statement of a rule's basis and purpose enables reviewing courts to avoid their responsibility to decide the substantive issues presented. This will inevitably allow courts to substitute their judgment for that of the agency by simply finding inadequate the agency's description of its legal analysis, as distinct from the legal analysis itself.

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[4] H.R. 1827, sec. 506, described in H.R. Rep. No. 28, 100th Cong., 1st Sess. 120 (1987).

The importance of correcting this erroneous approach by the court which adjudicates the vast majority of challenges to agency action is self evident. As a practical matter, agencies must tailor their procedures to the standards set by the Court of Appeals for the District of Columbia Circuit. If that court is allowed to continue to fashion its own procedural requirements, this Court's opinions pointing to a different path will soon be seen as little more than academic curiosities that are irrelevant to administrative law as actually practiced.[5]

I. The Court of Appeals' "Statement of Basis and Purpose."

Despite this Court's guidance to the contrary, the court below continues to expand its common law of administrative procedure.[6] Having been instructed in *Vermont Yankee*, 435 U.S. 519, not to impose extra-statutory procedural requirements, the court now turns to expansive statutory construction to achieve the same result. It here finds in the APA's "concise general statement of . . . basis and purpose" a requirement not only that the agency explain the reasons it adopted the rule, but also that it must explain the statutory derivation of those reasons. The court further requires that the agency explain why the rule was not rejected in favor of other rules that might have been proposed. Rules unaccompanied by such explanations are vacated.[7]

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[5] Witness a prominent commentator's characterization of the decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), as "largely one of those rare opinions in which a unanimous Supreme Court speaks with little or no authority." 1 K. Davis, *Administrative Law Treatise* 616 (2d Ed. 1978).

[6] *See generally* Scalia, *Vermont Yankee: the APA, the D.C. Circuit and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 348-56 & 378-80 (1979).

[7] The court of appeals' development of its expansive "statement of basis and purpose" parallels its development of the "hybrid" rulemaking procedures addressed in *Vermont Yankee*. *E.g.*, *Auto-*

The court's perfunctory reference to the APA changes neither the nature nor the consequences of its actions. It remains "the sort of unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding [that] can do nothing but seriously interfere with that process prescribed by Congress." *Vermont Yankee*, 435 U.S. at 548. Unlike the "explanation" required by this Court, the court of appeals' required statement is considerably more than a tool to aid the court in conducting its substantive review of the agency's action. It is a separate procedural element with a life of its own. The statement is examined in its own right. If it is found wanting, the court will vacate the agency action for procedural deficiency without regard to its substantive merit.[8]

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motive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968); *Amoco Oil Co. v. EPA*, 501 F.2d 722 (D.C. Cir. 1974); *Nat'l Welfare Rights Org'n v. Mathews*, 553 F.2d 637 (D.C. Cir. 1976); *Nat'l Wildlife Fed'n v. Costle*, 629 F.2d 118 (D.C. Cir. 1980); *Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788 (D.C. Cir. 1984).

Though other courts of appeals tend to cite early D.C. Circuit cases in this area, none has adopted that court's current view of the "statement of basis of purpose." Several have specifically disavowed such a broad concept. *E.g., Baltimore & Ohio Chicago Terminal R.R. v. United States*, 583 F.2d 678, 688 (3d Cir. 1978); *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 886 (4th Cir. 1983); *United States v. Garner*, 767 F.2d 104, 118 (5th Cir. 1985); *Alabama Ass'n of Ins. Adjustors v. Board of Governors*, 533 F.2d 224, 236-37 (5th Cir. 1976); *Sierra Club v. Clark*, 755 F.2d 608, 619 (8th Cir. 1985).

[8] In parts I and II of its opinion, the court disclosed a full understanding of both the basis and purpose of the rule under review. See note 1, *supra*. Though parts of the court's opinion appear to address substantive considerations, in the end the court makes clear that its invalidation of the rule is based solely on procedural grounds. App. 15a. *Cf. Vermont Yankee*, 435 U.S. at 539-42.

II. This Court's Approach Is Designed to Define the Bounds of Judicial Review and Enhance Respect for Administrative Discretion.

The Court's decisions make clear that an agency must "cogently explain" its action. *E.g., Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (hereinafter cited as *State Farm*); see note 15, *infra*. This requirement is a product of the "simple but fundamental rule of administrative law" that a court in reviewing an agency's action must rely on the agency's rationale. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). This explanation is not a separate procedural requirement. It is that part of the administrative record reflecting the agency's rationale. Availability of that rationale enables the court to maintain the integrity of the administrative process, *Atchison, Topeka and Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800, 807 (1973); *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943), "by making workable the system of restrictive judicial review in relation to the wide discretionary authority which Congress has given the [agencies]." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 196 (1941). At bottom, it is founded on the requirement, enunciated in *Opp Cotton Mills v. Administrator of Wage and Hour Division*, 312 U.S. 126, 144 (1941), that to avoid an unconstitutional delegation of legislative authority, an agency's "record of its action [must be] such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed."

The Court's opinions teach that disposition of cases on procedural grounds is disfavored.[9] Unless an agency's failure to comply with a statutory procedure materially affects the rights of a party, the reviewing court is ex-

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[9] *Cf. Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1966); *Foman v. Davis*, 371 U.S. 178 (1962) (referring to dispositions based on technical infractions of civil rules).

pected to rule on the substance of the action by applying the appropriate standard of review to the administrative record.[10] The explanation contained in that record is inadequate only if "the reviewing court simply cannot evaluate the [substantive merit of the] challenged agency action on the basis of the record before it." [11]

III. The Court of Appeals' Approach Obscures the Bounds of Judicial Review and Fails to Respect Administrative Discretion.

Notwithstanding this Court's emphasis on substantive review, the court below again demonstrates its predilection for disposing of cases on procedural grounds. The danger in this approach is particularly significant where, as here, the substantive challenge is based primarily on the "wisdom" of the agency's decision. Since the Court has specifically instructed reviewing courts not to "inquire into the wisdom of the" agency action, *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972), a court must uphold the action even if it deems the action unwise.

This principle will have little practical effect if reviewing courts are permitted to vacate actions for failure to provide fuller explanations underlying the articulated agency rationale.[12] Because the determination of the "ad-

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[10] This, in effect, is a reiteration of the harmless error rule embodied in the APA, 5 U.S.C. § 706.

[11] *Florida Power & Light Corp. v. Lorian*, 470 U.S. 729, 744 (1985). The Court reiterated its aversion to procedural rejection in *Vermont Yankee*, 435 U.S. at 549 & 558. The court of appeals' reluctance to accept this guidance indicates that it agrees, at least in principle, with Professor Davis's view that *Vermont Yankee* was overruled by *State Farm, supra*, p. 9. *See* Panel Discussion, *Present at the Creation: Regulatory Reform Before 1946* (featuring K. Davis & W. Gellhorn), 38 Admin. L. Rev. 507, 527 (1986).

[12] The court of appeals has stated: "[O]ur review of [an agency's] procedural integrity in promulgating the regulations before

equacy" of a statement of basis and purpose allows a subjective inquiry, rejection of a rule on this basis avoids rigorous analysis and critique.[13]

The court of appeals' expansive view of the requirement for a statement of basis and purpose distorts the administrative process. At best, it is a vexatious, extra-statutory procedural burden. At worst, it is a handy veil behind which a court may substitute its judgment for the agency's in a manner which eludes detection.

IV. The Requirement Has No Statutory Basis and Is Contrary to This Court's Guidance.

The notion that the court below is implementing an APA procedural requirement will not withstand scrutiny. The statutory language, its legislative history and its contemporaneous interpretation by the Attorney General belie any intent by Congress to burden informal rulemaking with the extensive procedural requirements here imposed.

The Attorney General's Manual on the Administrative Procedure Act discusses the statement of basis and purpose as follows:

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us is the product of our independent judgment, and our main reliance in ensuring that, despite its broad discretion, the Agency has not acted unfairly or in disregard of the statutorily prescribed procedures." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978) (decided five months after *Vermont Yankee*).

[13] Because the agency can never be sure what the court will want included in the "statement of basis and purpose" for a given rule, the tendency will naturally be to throw everything in. *Cf. Vermont Yankee*, 435 U.S. at 547-48. This serves to increase the bulk of the Federal Register, but still does not assure judicial approval. The final rule here occupied less than seven column-inches in the Federal Register. 50 Fed. Reg. 19,178. The "concise general statement" accompanying it exceeded 200 column-inches, 50 Fed. Reg. 19,170-78, and incorporated by reference another 34 pages of the Federal Register (the NPRM, 48 Fed. Reg. 4408-42), a 68-page Reg-

> The required statement will be important in that the courts and the public may be expected to use such statements in the interpretation of the agency's rules. The statement is to be "concise" and "general". Except as required by statutes providing for "formal" rule making procedure, findings of fact and conclusions of law are not necessary. Nor is there required an elaborate analysis of the rules or of the considerations upon which the rules were issued. Rather the statement is intended to advise the public of the general basis and purpose of the rules.[14]

In the APA, Congress carefully circumscribed the courts' ability to overturn agency actions. Here the court seeks to circumvent that restrictive statutory design by redefining a narrow procedural element. The court cautions against an "overly literal" reading of the terms "concise" and "general," App. 9a. Not even the most liberal of readings, however, would justify the conclusion that the Congress intended to impose the procedural requirements the court below seeks to include under the rubric of the statement of basis and purpose. Indeed, even replacing the words "concise general" with "elaborate detailed" would not justify requiring a brief on the legal issues underlying the stated basis or an exhaustive report on possible alternatives to the agency's chosen course.

Although the court of appeals' "statement of basis and purpose" bears a superficial resemblance to this Court's requirement that an agency "cogently explain" its action,[15] the two concepts are fundamentally different in

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ulatory Impact Analysis, and a 66-page Environmental Assessment. It seems more likely that it would have been faulted for not being concise, than for being inadequate.

[14] *Attorney General's Manual on the Administrative Procedure Act* 32 (1947). This Manual is "entitled to some deference . . . because of the role played by the Department of Justice in drafting the legislation." *Vermont Yankee*, 435 U.S. at 546.

[15] *State Farm*, *supra*, p. 9, 463 U.S. at 48. "[T]he agency must examine the relevant data and articulate a satisfactory explanation

their application and effect. All that is required under this Court's approach is a "contemporaneous explanation" which indicates "the determinative reason for the final action taken." *Camp v. Pitts*, 411 U.S. 138, 143 (1971). That explanation is adequate if it discloses "the factors that were considered" and the agency's "construction of the evidence." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (hereinafter cited as *Overton Park*). There is no basis in this Court's decisions for a requirement that the agency explain how it derived the factors it considered from the governing statute or why those factors did not lead to a different course of action.

A. Statutory Derivation.

The court below correctly observed that the agency's rule was based on its view that the Merchant Marine Act's "broader policy mandates" encompass the "promotion of a more competitive and efficient merchant fleet." App. 13a. Although the court itself had previously used similar terminology in describing the Act's objectives,[13]

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for its action including a 'rational connection between the facts found and the choice made.' Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)." *Id.* at 43. The Court had previously held, in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756 (1973), that the *Burlington Truck Lines* requirements did not apply to informal rulemaking, and in applying it in *State Farm* thought it "relevant that Congress required a record of the rulemaking proceedings to be compiled and submitted to a reviewing court . . . and intended that agency findings . . . would be supported by 'substantial evidence on the record considered as a whole.'" 463 U.S. at 43-44 (citations omitted). *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 538 (1981), is similar in this regard. Thus, it is not clear that the Court would apply even these less burdensome standards to the agency action at issue here—informal rulemaking with APA record-making requirements only. *But cf. Bowen v. American Hosp. Ass'n*, 476 U.S. ——, 106 S.Ct. 2101 (1986).

[13] See cases cited at p. 5, *supra*. Note, too, that in *Seatrain*, 444 U.S. at 584, the Court described the Act's purpose as being to develop and maintain "a large and effective merchant marine" consisting of a "modern and efficient" fleet.

it refused to decide whether the agency's interpretation of the statute was reasonable and vacated the rule because of the agency's failure to explain why it felt its construction was reasonable.[17]

The Court has instructed courts reviewing an agency's construction of the statute it administers to use a deferential standard and attitude. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court has also explained that an agency's failure to provide reasons for its statutory construction may affect the degree of deference a court gives that construction. *E.g., Adamo Wrecking Co. v. United States*, 434 U.S. 275, at 287-88, n.5 (1978). But it has never suggested that a reviewing court may avoid its independent duty to construe the statute by requiring the agency to provide further support for its construction.[18]

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[17] Since the interpretation at issue was not a product of this rulemaking, there was no reason for the agency to explain it in the record of this rulemaking. It did indicate in the NPRM, 48 Fed. Reg. at 4411-12, that this interpretation was routinely used in administering the Act. Undoubtedly its view was influenced by the judicial views referred to in note 16, *supra*. At most this expression of its view was a "general statement of policy" that is exempt from the requirements of 5 U.S.C. § 553(b) & (c). The common practice where the court desires a more thorough analysis of a question of law not addressed in the administrative action under review is to direct the parties to submit briefs on the subject. *E.g., United States v. Florida E. Coast Ry.*, 410 U.S. 224, 226-27 (1973). In *United States v. City of Fulton*, 475 U.S. ——, ——, 106 S.Ct. 1422, 1426 (1986), the Court conducted "its own examination of the historical record" seeking an explanation for a relevant, though pre-rulemaking, statutory interpretation.

[18] *Cf. Railway Labor Executives Ass'n v. United States R.R. Retirement Bd.*, 749 F.2d 856 (D.C. Cir. 1984) (*Chevron* deference principles cited as basis for vacating agency action without substantive review where agency fails to articulate interpretation of statute). Though the court did not cite *Railway Labor Executives* or *Chevron* in this case, its reasoning was similar to that used in the former case.

After noting that the agency failed to discuss how it derived its policies from the statute, the court below continued: "We take no position on whether these policies can be squared with the Act. But in the absence of any such discussion, this court can only conclude that [the] action is 'arbitrary, capricious, . . . or not otherwise [sic] in accordance with law.' 5 U.S.C. § 706(2)(A) (1982)." [19] The contrast with this Court's directions could hardly be sharper: "So long as the policies can be discerned, the court may exercise *its proper function* of determining whether the agency's policies are consistent with congressional directives." [20]

B. Alternatives.

According to the court below, the statement of basis and purpose for the action taken must include an explanation why different actions were not taken.[21] There

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[19] App. 14a. Ironically, the lower court cites *Overton Park*, 401 U.S. 402, 412-13, 416, in support of its action. *But cf. id.*, at 416: "The reviewing court must consider whether the Secretary properly construed his [statutory] authority." The APA itself directs that "the reviewing court shall decide all relevant questions of law [and] interpret . . . statutory provisions." 5 U.S.C. § 706 (1982).

[20] *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 809 (1973) (emphasis added). *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981), is not *contra*. There the Court held that the objective sought by the agency was not authorized by the statute and that therefore the agency had acted beyond statutory authority in promulating the rule. In this case, the court below ruled that the Secretary's rule "was well within her statutory authority." App. 4a. In other words, *American Textile* addressed the issue of "improper purpose" whereas the court below was concerned with an "irrelevant consideration." This distinction is more clearly developed in English law. *See generally*, Taylor, *Judicial Review of Improper Purposes and Irrelevant Considerations*, 35 Cambridge L.J. 272 (1976).

[21] App. 13a & 15a. The court below fails to note that the proposed rule itself resulted from the agency's consideration of the comments and alternatives offered during the previous rulemaking and other

is nothing in the APA or the decisions of this Court to support such a requirement. In *State Farm*, the Court was careful to explain that it was not sanctioning a broad requirement that agencies consider alternatives. 463 U.S. at 50-51. The Court held only that it was unreasonable for the agency to revoke a safety standard on grounds that it was no longer viable without examining the viability of each of the alternative means of complying with the standard. The alternative was an integral part of the standard being revoked.[22] The Court has also recognized that consideration of alternatives is explicitly required by some statutes.[23] In the absence of a statutory duty to do so, however, the Court has required an agency to consider an alternative only when the alternative was so inherent in the action the agency took that its failure

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public proceedings involving CDS payback beginning in 1977, including the litigation which resulted in this Court's decision in *Seatrain*. *See* NPRM, 48 Fed. Reg. 4408-31 (Jan. 31, 1983). The court does note that "the Secretary consider[ed] and reject[ed] at least a half-dozen other suggested measures" in the Regulatory Impact Analysis (RIA), App. 13a, but faults her treatment as being founded on "non-statutory," economic criteria. The RIA is a creature of Executive Order No. 12,291, 3 C.F.R. 127 (1981). Its primary purpose is to assess the economic impact of proposed regulations. And while it constitutes a part of the record of the agency action, it is not, in itself, subject to judicial review. *Id.*, § 9.

[22] The Court's action in *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962), was founded on similar grounds. There the ICC had a choice of alternative remedies to a problem causing inadequate trucking service. The Court merely held that it was unreasonable under the circumstances for the ICC to select one option without even considering the others. Once again the alternative was inherent in the action taken.

[23] *E.g.*, *Overton Park*, 401 U.S. 402 (1971) (consideration of alternatives required by section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c), and by the Federal-Aid Highway Act, 23 U.S.C. § 138); *Vermont Yankee* (consideration of alternatives required by the National Environmental Policy Act, 42 U.S.C. §§ 4321-35).

to consider that alternative made the chosen action itself unreasonable.

This approach is the only one that makes sense where, as here, the court's function is to rule on the reasonableness of the agency's action. *Overton Park, supra.* The existence of other reasonable alternatives (no matter how obvious) is irrelevant to the question whether the action taken was reasonable. As the Court noted in *Mourning v. Family Publications Service*, 411 U.S. 356, 371-72 (1973): "That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." [24]

Here again the court below ignores this Court's guidance. The court below holds that the agency must, as a procedural matter, explain its decision to reject alternatives without regard to their relationship to the action actually taken, and without regard to the reasonableness of that action.[25] In the present case, the agency had no statutory duty to consider alternatives, and no alternatives were inherent in the action it actually took.

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[24] *Cf. Ansonia Bd. of Ed. v. Philbrook*, 479 U.S. ——, ——, 107 S.Ct. 367, 377 (1986): Where a "statute directs that any reasonable accommodation . . . is sufficient," once the court determines that the proposed accommodation is reasonable, the "inquiry is at an end."

[25] The court below makes no distinction between actions involving a statute, such as NEPA, which mandates consideration of alternatives, and those not involving such a statute. *Compare Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1301 (D.C. Cir. 1979) (NEPA) *with NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982) (No statutory mandate). Sometimes the court is content if the agency considers "obvious" alternatives. *E.g., Public Citizen v. Steed*, 733 F.2d 93, 99 (D.C. Cir. 1984). Of course, alternatives which seem obscure, or even remote, during the rulemaking process have a way of becoming obvious during judicial review. *Cf. Vermont Yankee*, 435 U.S. at 549-55.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6068

INDEPENDENT U.S. TANKER OWNERS COMMITTEE

v.

ELIZABETH H. DOLE, SECRETARY,
U.S. DEPARTMENT OF TRANSPORTATION, *et al.*

And Consolidated Case Nos. 85-6069, 85-6134, 85-6135, 85-6136, 85-6137, 85-6138, 85-6163

[Filed Mar. 24, 1987]

Before: EDWARDS and BORK, Circuit Judges; SWYGERT*, Senior Circuit Judge, U.S. Court of Appeals for the Seventh Circuit.

PER CURIAM

ORDER

Upon consideration of the petitions for rehearing of American Petrofina, Inc. and Atlantic Richfield Company, it is

ORDERED, by the Court, that the petitions are denied.

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* Sitting by designation pursuant to 28 U.S.C. Section 294(d).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6068

INDEPENDENT U.S. TANKER OWNERS COMMITTEE,
Appellant

v.

ELIZABETH H. DOLE, SECRETARY,
U.S. DEPARTMENT OF TRANSPORTATION, *et al.*

And Consolidated Case Nos. 85-6069, 85-6134, 85-6135, 85-6136, 85-6137, 85-6138 & 85-6163

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 85-01555, 85-01740, 85-01752 and 85-1771)

Argued November 10, 1986

Decided January 16, 1987

Joseph A. Klausner, with whom *Allan A. Tuttle* was on the brief for appellant, Independent U.S. Tanker Owners Committee in Nos. 85-6068 and 86-6134.

Amy Loeserman Klein, with whom *William E. Cohen* and *Marc A. Bernstein* were on the brief for appellants,

First Attransco Tanker Corp., et al. in Nos. 85-6136 and 85-6163.

Daniel P. Levitt, with whom *Richard J. Wertheimer* was on the brief for appellant, Overseas Shipbuilding Group, Inc. in No. 85-6138.

Robert J. Blackwell, *Anne E. Mickey*, *Jeffrey R. Masi* and *Linda L. Martin* were on the brief for appellant, Alaska Bulk Carriers, Inc., et al. in No. 85-6069.

Williams E. McDanels, *Kevin T. Baine* and *Jonathan Blank* were on the brief for appellant, Seatrain Lines, Inc. in Nos. 85-6134, 85-6135, 85-6136 and 85-6137.

Kenneth N. Weinstein, Deputy Assistant General Counsel for Litigation, Department of Transportation, with whom *Richard K. Willard*, Assistant Attorney General, Department of Justice, was on the brief for appellees, Secretary of Transportation, et al. in Nos. 85-6068, et al. *Michael Kimmel* and *Robert S. Greenspan*, Attorneys, Department of Justice, entered appearances for appellees.

Roy C. Bowman and *Richard H. Saltsman* were on the brief for appellee, American Petrofina Inc. in Nos. 85-6068, et al.

Michael Joseph, *Mark P. Schlefer*, *Thomas L. Mills* and *Donald M. Squires* were on the brief for appellees, Atlantic Richfield Co., et al. in Nos. 85-6068, et al.

Before: EDWARDS and BORK, *Circuit Judges*, and SWYGERT, **Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* BORK.

BORK, *Circuit Judge*: These consolidated cases are before us on appeal from a decision of the district court, which sustained the validity of a rule promulgated by the Secretary of Transportation. Appellants challenge the

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* Of the United States Court of Appeals for the Seventh Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

rule as exceeding the Secretary's statutory authority and as arbitrary and capricious agency action; they also raise a battery of specific procedural objections to the manner in which the rule was promulgated. We find that the Secretary was well within her statutory authority in promulgating the rule, but that she failed to provide an adequate account of how the rule serves the objectives set out in the governing statute, the Merchant Marine Act of 1936, ch. 858, 49 Stat. 1985 (codified as amended at 46 U.S.C. §§ 1101-1295g (1982)).

I.

The rulemaking that gives rise to this case is the latest of numerous attempts by the Congress, the Maritime Administration, and the Department of Transportation to address the recurrent problems of the United States merchant marine fleet. The American fleet has had great difficulty competing in foreign commerce. American ships typically have higher construction and operating costs than their foreign competitors, not only because they typically must meet more stringent environmental and safety standards, but also because foreign ships often are subsidized and otherwise assisted by their own governments. Congress confronted these problems in 1936 and authorized the United States government to pay up to half the construction costs of American ships that will operate in foreign commerce. 46 U.S.C. §§ 1151-1152 (1982). In addition, Congress authorized the government to subsidize the operating costs of these ships where necessary to meet foreign competition. *Id.* §§ 1171-1172. Despite these provisions, American ships have continued to fare poorly against their competitors in foreign commerce.

Merchant ships that operate in the domestic shipping market do not receive these government subsidies. They are protected from the rigors of foreign competition, however, by the Jones Act, which requires all cargo

transported between points in the United States to be carried on ships built in the United States, registered in the United States, and owned by American citizens. 46 U.S.C. § 883 (1982).[1] They are also protected from having to compete against any of the ships that have received construction subsidies or operating subsidies from the government, except in a few specific and very limited instances.[2] Since the Trans-Alaska Pipeline opened in 1977, however, the domestic fleet has been unable to satisfy the great new demand for large tankers to carry Alaskan oil to other points in the country. The Maritime Administration has responded to this situation by invoking its statutory authority to allow certain subsidized ships to operate in the domestic market for up to six months in a given year if the ships repay a proportional share of the construction subsidy that they have received. 46 C.F.R. Part 250 (1984). Yet this step has only partly solved the problem.

The rule at issue in this case permitted tanker vessels built with the assistance of a federal construction-differential subsidy, which had been barred from competing in domestic trade on account of that subsidy, to undertake domestic operations if they agreed to repay the unamortized portion of the subsidy plus interest during a period that began on June 6, 1985, and closed

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[1] Congress has also established a loan guarantee program to assist the financing of domestic ships. 46 U.S.C. §§ 1271-1276 (1982).

[2] A subsidized ship is not permitted to operate in domestic commerce except in a few limited circumstances, such as on the first or last leg of an overseas voyage if the owner repays a prorated portion of the original subsidy, or upon the Secretary of Transportation's determination that an exemption is necessary or appropriate to carry out the purposes of the Merchant Marine Act, although the latter exception does not allow a subsidized ship to operate in the domestic trade for more than six months in a given year. 46 U.S.C. § 1156 (1982).

one year later. *See* Construction-Differential Subsidy Repayment; Total Payment Policy, 50 Fed. Reg. 19,170 (1985) (codified at 46 C.F.R. § 276.3 (1985)) (hereafter the "payback rule"). This rule addressed problems in both the foreign and domestic markets by providing an opportunity for ships that are not competitive in foreign commerce to enter the domestic market where the demand for their services has increased, but only by agreeing to relinquish their financial advantage over unsubsidized ships. The Maritime Administration has considered proposals for individual ships to repay their subsidies at least since 1964. In 1977, several owners of unsubsidized ships challenged the Administration's approval of repayment by one vessel in particular. The Supreme Court upheld the government's authority to approve subsidy repayment in exchange for permission to enter the domestic market. *See Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980). Shortly thereafter, the Administration established an interim rule that extended this authorization to undertake domestic shipping, upon repayment of the full subsidy plus interest, to a limited class of large tankers whose owners demonstrated "exceptional circumstances" of dismal prospects in foreign commerce to justify the application of the rule. *See* 45 Fed. Reg. 68,393 (1980). The interim rule was challenged, and this court invalidated it, finding that although the Administration had statutory authority to promulgate the rule, it had acted arbitrarily and capriciously by providing an inadequate discussion of the basis and purpose of the rule. *See Independent U.S. Tanker Owners Comm.* v. *Lewis*, 690 F.2d 908, 918-20 (D.C. Cir. 1982). At that point, the Secretary of Transportation proposed the payback rule. This rule is similar to the earlier proposed interim rule except that it covers all tankers and does not require tankers to make any showing of "exceptional circumstances" to qualify for the benefits of subsidy repayment.

II.

Appellants initially question the Secretary's statutory authority to promulgate the payback rule. In *Seatrain*, however, the Supreme Court expressly recognized the government's authority under the Merchant Marine Act to approve the repayment of a ship's construction subsidy in return for the lifting of restrictions on domestic operations by that ship. 444 U.S. at 588. Although in *Seatrain* the subsidy repayments were granted on an individualized basis and on a showing of exigent circumstances that justified the need for the government's action, the Court did not rely on either of these facts. Instead, the Court rested its conclusion on "the Secretary's broad contracting powers and discretion to administer the Act," especially the power to approve measures that "directly further the general goals of the Act." *Id.* In particular, the Court stressed the difference between a permanent release from the foreign-trade-only requirement, which requires a vessel to repay its subsidy before it can enter the domestic market, and a temporary release that might render a subsidized ship "capable of taking advantage of every shift in trade and profitability, skimming the cream and leaving what remains to those less mobile." *Id.* The Court stated that a temporary release would be very problematic, but a permanent release was not, at least insofar as it was conditioned on "full repayment" of the subsidy so as to confer no "windfall." *Id.* at 589 & n.31.

The payback rule satisfies these criteria and thus its promulgation falls within the Secretary's statutory authority under the Merchant Marine Act. *See* 46 U.S.C. §§ 1151-1156 (1982); *see also Independent U.S. Tanker Owners Comm.*, 690 F.2d at 917-18 (finding the earlier interim rule to be in harmony with the statutory mandate of the Merchant Marine Act). Indeed, this rule comes much closer to satisfying the Court's concern about "cream-skimming" in the domestic market by subsidized

ships than did the Maritime Administration's previous response to the problem, undertaken pursuant to specific congressional authorization, which was to allow certain subsidized ships to operate in the domestic market for up to six months in a given year if they agree to repay a proportional share of their subsidy. *See id.* § 1156; 46 C.F.R. Part 250 (1984).[3]

III.

Appellants contend that even if the Secretary acted within her statutory authority in promulgating the payback rule, it should be invalidated because it is the product of agency action that was "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A) (1982). In particular, appellants contend that the Secretary failed to provide a sufficiently reasoned discussion of why this rule was adopted and alternatives were rejected in light of the purposes of the Merchant Marine Act, which are the very purposes Congress intended the Secretary to serve when it gave her "broad" discretion to administer the Act. *See* 46 U.S.C. § 1151 (1982); *Seatrain*, 444 U.S. at 588.

It is unfortunate that, once more, we must agree with this contention. This court vacated the previous interim

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[3] In the Notice of Proposed Rulemaking, the Secretary identified facts that might be sufficient to establish the kind of exceptional circumstances that were touched on in *Seatrain* as justifying subsidy repayment. *See* 444 U.S. at 577. In particular, she noted that American tankers operating in foreign commerce "have not been financially successful," largely because of recent events that have been "financially devastating for the world tanker market." 48 Fed. Reg. 4408 (1983). Yet we do not hold that these exceptional circumstances are a *sine qua non* to the Secretary's statutory authority to adopt this rule, given her "broad contracting powers and discretion to administer the Act." *Seatrain*, 444 U.S. at 588. As long as the rule consists of a permanent release from restrictions upon full repayment of the subsidy plus interest, it is within the Secretary's authority under the Merchant Marine Act.

rule because the government "failed completely to fulfill its obligations" to set out an adequate statement of basis and purpose for the rule. *Independent U.S. Tanker Owners Comm.*, 690 F.2d at 919. Now, four years later, we must vacate a similar rule on similar grounds.

Under the Administrative Procedure Act, when an agency initiates a rulemaking that the governing statute does not require to be undertaken "on the record," the agency is nonetheless bound to comply with the requirements for "notice and comment" rulemaking set out in 5 U.S.C. § 533 (1982). *See, e.g., United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 234-41 (1973). One requirement is that after the agency considers the comments presented by the participating parties, it "shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). This statement need not be an exhaustive, detailed account of every aspect of the rulemaking proceedings; it is not meant to be the more elaborate document, complete with findings of fact and conclusions of law, that is required in an on-the-record rulemaking. *See id.* § 557(c). On the other hand, this court has cautioned against "an overly literal reading of the statutory terms 'concise' and 'general' . . . . [which] must be accommodated to the realities of judicial scrutiny." *Automotive Parts & Accessories Ass'n* v. *Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968). At the least, such a statement should indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did, particularly in light of the statutory objectives that the rule must serve. *See National Wildlife Fed'n* v. *Costle*, 629 F.2d 118, 134 (D.C. Cir. 1980); *Automotive Parts*, 407 F.2d at 338; *see also* S. Doc. No. 248, 79th Cong., 2d Sess. 20 (1946) ("The statement of the 'basis and purpose' of rules issued will vary with the rule, but in any case should be fully explanatory of the complete factual and legal basis as well as the object or objects sought.").

In *Seatrain*, the Supreme Court indicated that Congress gave the government broad power to implement the Merchant Marine Act so that the government could take steps that "directly further the general goals of the Act." 444 U.S. at 588. Those objectives are to foster the development and encourage the maintenance of an American merchant marine, in both foreign and domestic commerce, that is:

> (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair.

46 U.S.C. § 1101 (1982).

The Secretary's statement of basis and purpose fails to give an adequate account of how the payback rule serves these objectives and why alternative measures were rejected in light of them. The Secretary's treatment of these objectives, and of the concerns raised about them in the comment proceedings, is cursory at best. For example, concerns about whether this rule meets the statutory objective of maintaining an American merchant marine "sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce" are met with the statement: "The Department believes that the [rule]

will benefit the U.S. Merchant Marine." 50 Fed. Reg. 19,170, 19,173 (1985). Her discussion continues further, but it hardly improves:

> Although it is true, as many commenters pointed out, that some tankers will be forced out of service by more efficient operators, the industry should be more competitive and efficient in the future, especially since some of the most efficient tankers in the U.S. flag fleet would be fully utilized. . . . Overall, the industry should be left in a healthier, more viable condition.

Id. at 19,173-74. On the more dubious proposition that the fleet will remain able to carry "a substantial portion" of foreign commerce, the Secretary candidly acknowledges that "the final rule merely recognizes the existing condition of the U.S. tanker fleet. There currently exist few foreign trade employment opportunities for those vessels and the prospects for future employment in the foreign trade are far from bright." *Id.* at 19,174. Though this statement strongly suggests the view that this rule will hasten an American retreat from carriage of foreign commerce, the Secretary surprisingly asserts that the fleet will remain "more than adequate to carry an appropriate share of the U.S. foreign oil commerce if such opportunities should arise." *Id.* This remark is hard to fathom. If there is currently little hope for the employment of American vessels in foreign trade, then the payback rule will permit the total size of the American fleet to follow its natural tendency to decrease toward the level required by the domestic market. Under present conditions, therefore, the rule will make it impossible to retain a fleet that can carry all domestic traffic and "a substantial portion" of foreign traffic "at all times," which is explicitly set out as an objective in section (a) of the statute.

The Secretary's response to concerns about the rule's effects on the fleet as a naval auxiliary, to take another

example, is similarly unsatisfying. The Navy warned that the projected loss under this rule of "handy-sized" tankers might have adverse implications for national security. The Secretary brushes aside this comment by stating her belief that "the outlook for these old, small product tankers is poor regardless of whether or not this rule is promulgated because of their age and the decline of the U.S. products trade." *Id.* She also claims that other non-fleet ships could fill in the gap, *id.*, even though this observation may not help to satisfy the statutory objective that the fleet itself should constitute "a naval and military auxiliary in time of war or national emergency." 46 U.S.C. § 1101(b) (1982).

Rather than providing a more extensive discussion of the Merchant Marine Act's objectives, the Secretary chooses to rely on other policies in defending the rule. She identifies some of the "most important" reasons for the rule as being "economic efficiency," "use of underemployed resources," "increased competition," and "deregulation." 50 Fed. Reg. at 19,172. As she later elaborates: "It is the Department's position that the competitive forces of the market, rather than government regulation, should be relied upon, whenever feasible, to allocate transportation capacity and resources in the domestic trade. This rule reflects that position." *Id.* at 19,175. The central thrust of her approach, quite obviously, is to subject the merchant marine fleet to the discipline of the free market. Thus she finds it significant that the rule will leave the industry "in a healthier, more viable condition," *id.* at 19,174, and she finds it permissible that the condition of the fleet should depend on what economic opportunities become available in the world market. *See id.* This policy may well be defensible, yet it is not among the objectives specified in the Act, and if the Secretary has decided that it is implicit in or compatible with the statutory objectives, it would be useful for her to explain this decision somewhat more fully. She has failed to do so. The closest she comes is

the conclusory statement that "it would not be appropriate to let the various program objectives reflected in the Act stand in the way of achieving the Act's broader policy mandates, including that of promoting a more competitive and efficient merchant fleet." *Id.* It may, however, be entirely appropriate for the Act's objectives to stand in the way of the payback rule, and perhaps to favor other alternatives, unless the Secretary can offer a fuller and more persuasive explanation for her view that the "broader policy mandates" of the Act include the promotion of a "more competitive and efficient merchant fleet." [4]

The Secretary's failure to link the policies served by this rule to the objectives set out in the Merchant Marine Act is particularly problematic because she does not explain in the statement of basis and purpose why she rejects proposed alternatives to the payback rule. One can find this explanation in the Regulatory Impact Analysis, Joint Appendix ("J.A.") at 1049, where the Secretary considers and rejects at least a half-dozen other suggested measures. Once again, however, her account focuses on non-statutory criteria that favor this rule, such as lower transportation costs, collateral fiscal benefits, and more "efficient" use of the fleet. J.A. at 1089, 1093. She admits that the rule "has a number of adverse impacts," including "the displacement of about 13 tankers . . . most of which are militarily useful handy-sized tankers, loss of employment opportunities for about 800 seamen, and the possible default on several government loans," *id.* at 1093, problems that impinge on the statutory objectives and that might be avoided under some of the

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[4] It may be, of course, that present conditions in the world shipping market make it impossible for the Secretary to find a way to meet all of the statutory objectives. If this is the problem, she should discuss it frankly and directly when she considers which measures to adopt in light of the objectives explicitly set out in the Act.

alternative measures. *See, e.g., id.* at 1091-92 (describing effects of "full-time permissions" option, "status quo" option, and "eliminate permissions" option).

In exercising her decisionmaking authority, the Secretary is certainly free to consider factors that are not mentioned explicitly in the governing statute, yet she is not free to substitute new goals in place of the statutory objectives without explaining how these actions are consistent with her authority under the statute. Her failure to link these non-statutory criteria with Congress' stated objectives in the Act thus makes it impossible for us to uphold the Secretary's decision to reject other measures and adopt this rule in response to the current problems of the merchant marine fleet. Her reliance on these non-statutory criteria is consistently a key point in her justifications for adopting this rule. In order to defend this action as "reasoned decisionmaking," the Secretary must spell out in more detail how her decision to adopt this rule and reject alternative measures by relying on policies of competition and deregulation can be squared with the statutory objectives that Congress specified as the primary guidelines for administrative action in this area. We take no position on whether these policies can be squared with the Act. But in the absence of any such discussion, this court can only conclude that her action is "arbitrary, capricious, . . . or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A) (1982). *See also Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 412-13, 416 (1971) (choice made by the agency must be "in accordance with law" as it can be understood in light of the statutory indicia).[5]

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[5] The grounds of our decision make it unnecessary to discuss the array of more specific procedural objections that appellants have made to this rulemaking. The district court found each of those objections to be without merit, but we take no position on the correctness of those findings.

IV.

We therefore conclude that the Secretary violated section 553(c) of the Administrative Procedure Act by adopting this rule. In fashioning a remedy for an agency's failure to present an adequate statement of basis and purpose, this court may either remand for specific procedures to cure the deficiency without vacating the rule, *see, e.g., National Nutritional Foods Ass'n* v. *Weinberger*, 512 F.2d 688, 701, 703-04 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975), or it may vacate the rule, thus requiring the agency to initiate another rulemaking proceeding if it would seek to confront the problem anew. *See, e.g., Tabor* v. *Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 710-12 (1977). In this case, we vacate the rule because the Secretary's omissions are quite serious and raise considerable doubt about which of the proposed alternatives would best serve the objectives set out in the Merchant Marine Act. Yet we exercise our power to withhold issuance of our mandate until July 16, 1987, to avoid further disruptions in the domestic market and to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade. *See* Fed. R. App. P. 41(a). As of that date, the present rule will be vacated and conditions returned to the *status quo ante*, before the payback rule took effect, subject of course to any further action that may have been taken in the interim.

So ordered.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1555

INDEPENDENT U.S. TANKER OWNERS COMMITTEE,
Plaintiff,

v.

ELIZABETH H. DOLE, *et al.*,
Defendants.

And Consolidated Civil Action Nos. 85-1740,
85-1752 & 85-1771

Filed October 25, 1985

MEMORANDUM AND ORDER

JACKSON, Judge.

These consolidated cases represent a renewal of the protracted conflict between the Executive Branch official responsible for the administration of the Merchant Marine Act of 1936, 46 U.S.C. app. §§ 1151 *et seq.* (1982 & Supp. I 1983), (the "Act"),[1] and an *ad hoc* guild of

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[1] Administration of the Act was originally entrusted to the Secretary of Commerce, and, within his Department, the Maritime Subsidy Board and the Maritime Administration ("MarAd"). In 1981 both the responsibility and the administering agencies were transferred to the Secretary of Transportation by Pub. L. No. 97-31, 95 Stat. 151 (1981). *See, generally, Independent U.S. Tanker Owners Committee* v. *Lewis*, 690 F.2d 908, 910 n.1 (D.C.

shipowners who fear an infringement of the franchise they presently enjoy under the Act and related legislation.

Plaintiffs are owners and operators of various-sized U.S.-flag tankers built entirely with private capital and now employed in the domestic trade, primarily in the transport of crude oil from the oil fields of the Alaskan North Slope ("ANS") to Panama. Defendant Secretary of Transportation (the "Secretary") has, by rule last published May 7, 1985 (the "payback rule"), purported to enable similar vessels built with government subsidies to be relieved of statutory restrictions on competition with plaintiffs' ships in the same trade by repaying their subsidies within the year.[2] Defendant-intervenors are subsidized-vessel owners/operators who expect to avail themselves of the payback rule. At issue is whether, and, if so, to what extent and in what circumstances, the Secretary may lawfully implement the payback rule. The cases are presently before the Court on cross-motions for summary judgment, and, because they entail only a review of agency action taken pursuant to the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1982) ("APA"), the parties agree that there are no material issues of fact in dispute which could be tried in this forum. *See Camp* v. *Pitts*,

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Cir. 1982). All references to "the Secretary" herein are to the responsible Executive Branch officers at the relevant time, irrespective of the departments in which they served.

[2] Another shipowner, Seatrain Lines, Inc., *see infra*, has recently moved to intervene as a party-plaintiff, alleging that the competition it anticipates for its vessels previously admitted to the domestic trade as hardship cases will be ruinous, and those still outside—all idle—which would like to repay their construction subsidies are unable to do so without further financial aid from the government, which is unlikely to be forthcoming. Those defendants who oppose the motion for leave to intervene do so on standing and timeliness grounds. The motion is granted.

411 U.S. 138 (1973).[3] For the reasons set forth below, the Court concludes that the Secretary acted in accordance with law and within the limits of her discretion, and will, therefore, deny plaintiffs' motions for summary judgment, grant those of defendant and defendant-intervenors, and dismiss the several complaints with prejudice.

I.

The twentieth-century tribulations of the American maritime industry have been well-documented in the history of the legislation which has been enacted for its protection and in the judicial antecedents of this case.[4] In brief and general summary, the U.S. merchant marine has been so beset by circumstances—including, *inter alia*, large subsidies given by other trading nations to their own flag fleets, and the higher wages, safety standards, and costs of operation obtaining aboard its own—that it has been rendered largely uncompetitive with foreign merchantmen at sea. To redress its competitive disadvantages and encourage American shipping abroad, therefore, Congress has for a number of years authorized construction and operating differential subsidies ("CDS" and "ODS," respectively) to be paid by the government for ships to be built in U.S. shipyards which are destined for carriage in foreign commerce under the U.S. flag. 46 U.S.C. app. §§ 1151-61. Only U.S.-flag vessels which have received no construction or operating differential subsidies, however, are eligible to participate in an artificial domestic shipping market from which both foreign car-

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[3] Jurisdiction is predicated upon §§ 701 *et seq.* of the APA, and 28 U.S.C. §§ 1331, 1333, 1337, 1651, 2201-02 (1982). Review is sought pursuant to 706(2)(A) of the APA.

[4] *See, generally, Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 574-75, 584 (1980); *Independent U.S. Tanker Owners Comm.* v. *Lewis*, 690 F.2d 908, 911-13 (D.C. Cir. 1982). *See also* Kurtz & Isikoff, *Industry Foundering In an Ocean of Aid*, Washington Post, July 16, 1985, at A1, col. 1.

riers and government-subsidized U.S.-flag ships are excluded by Section 27 of the Merchant Marine Act of 1920 (the "Jones Act"), 46 U.S.C. app. § 883 (1982 & Supp. I 1983), and Section 506 of the Act of 1936, 46 U.S.C. app. § 1156 (1982 & Supp. I 1983). The U.S.-flag fleet is, thus, divided generally into two distinct segments: the so-called "Jones Act fleet," operating exclusively in the protected U.S. domestic trade, safe from all but intramural competition; and the subsidized overseas fleet, permitted, as a matter of policy, to operate only in foreign commerce.[5]

Even with the substantial help of government subsidies, however, U.S.-flag tankers have fared poorly in the international mercantile competition over the course of the last decade. Primarily as a result of market forces beyond the United States'—or any one nation's—control, world shipping rates have fallen below the break-even costs of the subsidized American industry. At the same time, however, not altogether by coincidence, the domestic market has flourished, especially down the West Coast *en route* from the Alaskan oil fields to Panama. As a result, since the late 1970's, substantial pressure has been building to relax the strictures of Section 506 of the Act and admit subsidized tankers to the domestic trade to share the bounty.

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[5] To prevent unfair competition between its subsidized vessels and those constructed and operated entirely with private capital, the U.S. has required that any ship built with CDS funds operate exclusively in foreign trade, with two minor exceptions: CDS vessels may sail in the domestic trade on either the first or last leg of an overseas voyage, and MarAd may consent to the operation of a CDS tanker in the domestic trade for up to six months in any 12-month period whenever it determines that "such transfer is necessary or appropriate to carry out the purposes" of the Act. Proportional repayment of the subsidy is required under either exception. 46 U.S.C. app. § 1156. *See Atlantic Richfield Co.* v. *United States,* Nos. 84-5752, 84-5885 (D.C. Cir. October 11, 1985).

In 1980, the Supreme Court held the Secretary to have authority to release a single financially-distressed CDS vessel permanently from its foreign trade commitment, provided the unamortized portion of its subsidy were repaid with interest. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980). Although the *Seatrain* case involved but one ship in unique circumstances of duress upon which the Supreme Court dwelt at length in its opinion, shortly after the decision MarAd issued what it called an "interim" rule of general applicability which would have permitted certain other vessels to repay their CDS to gain admission to the domestic trade, upon a showing of exceptional circumstances and after a determination that no favorable employment opportunities existed for them in foreign commerce. Then, pursuant to its "interim" rule, MarAd granted an application for repayment of its CDS by a second large tanker.

The "interim" rule was immediately challenged by plaintiff Independent U.S. Tanker Owners Committee ("ITOC") on both procedural and substantive grounds vaticinal of most of those it asserts here.[6] In September, 1982, the court of appeals struck down the "interim" rule for MarAd's failure to accompany it with a statement of basis and purpose, and remanded to the district court with instructions to vacate the "interim" rule and order new rulemaking proceedings. *Independent U.S. Tanker Owners Committee* v. *Lewis*, 690 F.2d 908, 918-20. (D.C. Cir. 1982) (hereinafter cited as "*ITOC*").

On January 31, 1983, therefore, the Department of Transportation published the immediate ancestor of the instant payback rule, which purported to permit the re-

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[6] Unlike the payback rule, however, the "interim" rule contemplated *ad hoc* determinations of each individual application for a CDS repayment, afforded notice and opportunity to comment as to each, and required, as a necessary condition for approval, a showing that "no favorable opportunities exist for viable employment of the vessel in the foreign trade." 46 C.F.R. § 276.3(b) (1984).

payment of its CDS by any vessel without first requiring a demonstration of economic necessity. 48 Fed. Reg. 4408 (1983). While the rulemaking was pending, however, Congress acted, on three separate occasions, to preclude implementation of the proposed rule for finite periods, the last prohibition expiring May 15, 1985.[7] A week earlier, anticipating the removal of the impediment, the Secretary promulgated the instant payback rule, in its present and final form, 50 Fed. Reg. 19,170 (1985) (to be codified at 40 C.F.R. pt. 276) (proposed May 7, 1985), to become effective one month later. The payback rule provides, in substance, that any tanker vessel built with CDS may repay its subsidy, with interest, in return for permission to permanently enter the domestic trade, conditioned only by a requirement that the repayment obligation be satisfied by June 8, 1986.

During the two-year hiatus occasioned by Congress' moratoria on implementation of the rule, plaintiffs, or some of them, petitioned the Secretary to reopen the record to receive comments with respect to "changed circumstances" in the interim. But, although it appears from the record that some additional comments were received informally from other interested parties, plaintiffs' petitions to reopen were formally denied, in conjunction with the promulgation of the rule in final form, on the ground that the reopening of the record was both unnecessary (the Secretary having been already sufficiently apprised of plaintiffs' positions) and would serve only to delay the matter further. The Secretary also stated that

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[7] *See* Department of Transportation Appropriations Act, FY 1984, Pub.L. No. 98-78, 97 Stat. 453; Department of Commerce Appropriations Act, FY 1984, Pub.L. No. 98-166, 97 Stat. 1071; and Department of Commerce, Justice and State Department Appropriations Act, FY 1985, Pub.L. No. 98-411, 98 Stat. 1545.

The Court is informed that on June 12, 1985, the House of Representatives passed a similar prohibition which is now pending before the entire Congress as part of the 1985 supplemental budget proposal.

she was receiving "up-to-date" information from the Department of Energy and other sources, bringing to her attention directly any "changed circumstances."

II.

The Secretary's Authority Under the Act

Notwithstanding the *Seatrain* case, *supra*, plaintiffs say, the Secretary lacks authority under the Act to lift domestic trading restrictions on *all* CDS-built vessels by means of single rule which applies automatically to the entire subsidized tanker fleet without regard to circumstances. The Secretary maintains the issue was determined in her favor by the Supreme Court in *Seatrain*.

It is certainly arguable that *Seatrain* was limited to its facts. The case concerned the approval of the application of a single CDS tanker for admission to the domestic trade, not an entire flotilla, and in upholding the Secretary's authority to allow the application conditioned upon a repayment of its CDS, the Supreme Court remarked upon market conditions, took into consideration the straitened circumstances of the vessel's owner, and then concluded that nothing in the Act suggested that "the Secretary is forbidden to approve transactions *of this sort under these circumstances.*" 444 U.S. at 588 (emphasis added).

On the other hand, it is manifest from the balance of the *Seatrain* opinion that the Supreme Court ruled as it did as a matter of statutory construction, not in review of an exercise of administrative discretion. "The primary question for decision" was, as the Court stated it, "whether the Secretary . . . may terminate the restrictions imposed pursuant to [the Act] when the owners of a vessel constructed with a CDS repay that subsidy in full." *Id.* at 574. It said nothing about the plight of the applicant or the state of the market. And, in reversing a decision of the court of appeals for this circuit which

had found, in the express provision in Section 506 of the Act for *temporary* admissions of CDS vessels to the domestic trade upon specified conditions, an implied prohibition of *permanent* admissions upon any conditions, the Court said:

> The Court of Appeals was of the view that the specific exceptions in § 506 marked the limit of the Secretary's authority to approve entry of subsidized vessels into the domestic trade. By its logic, detail, and legislative history, the panel majority reasoned, that section prohibits transactions like the one before us. In consequence, that court found the broad sweep of the Secretary's power under the balance of the Act irrelevant, the express language giving the Secretary authority to make and amend contracts unimportant, and the policy arguments advanced by the Secretary unpersuasive.
>
> We disagree. On the face of the statute, the Secretary's broad contracting powers and discretion to administer the Act seem to comprehend the authority urged by petitioners here.

Id. at 587-88 (footnote omitted). "In conclusion," it said, "we hold that the Act empowers the Secretary to approve full-repayment/permanent-release transactions of the type at issue here. . . . [W]e express no view upon the merits of the Secretary's particular exercise of discretion with regard to the [vessel involved] since that issue is not before us." *Id.* at 597.

This Court concludes that *Seatrain* did confirm the discretionary authority of the Secretary under the Act to admit CDS-built vessels to the domestic trade, upon repayment of their subsidies, in circumstances otherwise undefined.[8] It must, therefore, consider whether the au-

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[8] The court of appeals subsequently observed of *Seatrain* in *ITOC* v. *Lewis*, *supra*, "The Supreme Court specifically did not address the question . . . of when or how [the Secretary] might

thority can be exercised without regard to individual circumstances at all other than generic market conditions for U.S.-flag tankers and consumers of their services.

Conformity of the Payback Rule With the Act

Plaintiffs take issue with the payback rule itself in multiple respects. Assuming her discretion in the matter, they assert, the Secretary has abused it grievously by promulgating a rule with so drastic and precipitous an impact upon an entire industry that it will confound each of the purposes the Act proclaims for itself.[9] Plaintiffs maintain that the rule would compromise national defense because it would deplete the merchant fleet of the smaller, so-called "handy-tankers" which are most useful for military purposes. They argue that the rule imperils civilian commerce, because it abrogates the two-fleet principle embodied in the Jones Act, invites the *en masse* abandonment of foreign commerce by U.S.-flag vessels altogether,

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exercise this discretion [to allow permanent repayment and entry into the domestic trade] in accordance with the purposes of the Act." 690 F.2d at 913-14 & n.17.

[9] 46 U.S.C. § 1101 provides in pertinent part:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce . . . and to provide shipping service essential for maintaining the flow of such domestic and foreign . . . commerce at all times, (b) capable of serving as a naval and military auxiliary, . . . (c) owned and operated under the United States flag by citizens of the United States, . . . (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

See also, Seatrain, 444 U.S. at 584 & n.25.

and threatens the vitality of the domestic trade fleet by suffusing the market with a vast overtonnage. The decline of the domestic fleet would, in turn, diminish the number of jobs available for American merchant seamen. Moreover, the intensified competition would most severely affect the newer tankers in the ANS fleet, according to plaintiffs, because those ships are, as a rule, both debt-ridden and not fully written off, and must, therefore, operate at higher rates in order to cover costs. The result will be, according to plaintiffs, contrary to the Secretary's expectations, antithetical to the Act's objective of a modern and efficient merchant marine with the "safest" and "best" equipment aboard. Finally, plaintiffs submit that the influx of existing large CDS tankers into the ANS trade will significantly reduce demand for new tankers for the domestic trade, historically the largest consumer of new ship construction, thus idling the shipyards where they might have been built.[10]

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[10] Plaintiff Overseas Shipholding Group, Inc. ("OSG") also argues that the Secretary's rulemaking was inadequate in its failure to include an Environmental Impact Statement ("EIS") or satisfactorily explain its absence, as required by the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1982 & Supp. I 1983) ("NEPA").

NEPA requires that the promulgation of any rule be accompanied by an EIS, 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9 (1985), unless the agency finds that the rule will have "no significant impact" on the quality of the human environment. 40 C.F.R. § 1508.13 (1985). A finding of "no impact," in turn, must be supported by an environmental assessment ("EA"), containing "sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact." 40 C.F.R. §§ 1501.4, 1508.9.

The Secretary made such a finding, basing it upon a 65-page EA accompanying the rule, A.R. at 2490-2555, which discussed its potential hazards, the most significant being, of course, oil spills. The Secretary concluded that, some large CDS vessels being already in the trade, the nature of the hazard was merely more of the same rather an hitherto unencountered risk, and that larger vessels

The Secretary's response to each point invokes the same Darwinian principles, but the points are, each and all, touched upon, directly or indirectly, in her commentary accompanying the rule and the administrative record. Confronted with a surfeit of underemployed U.S.-flag vessels generally, she says, and an artificially dislocated market for their services, she has determined to dispense with at least one of the artifices within her control in the hope that disinhibited competition will, over time, distill the best U.S.-flag merchant tanker fleet of which present circumstances will admit, although admittedly less than every one would desire.

Plaintiffs' objections are all, in substance, simply that the Secretary has grossly underestimated the rule's sanguinary consequences, and that its ultimate effect will not be the survival of the fittest but the extinction of the entire species. But having been presented with an agency record which speaks to all the concerns to which plaintiffs give expression, this Court cannot, within the limits of the scope of the review it is permitted to make of the payback rule, find that the Secretary has failed to give consideration to the relevant factors or has made a clear error of judgment in her disposition of them. *See Center for Auto Safety* v. *Peck*, 751 F.2d 1336, 1342 (D.C. Cir. 1985) *quoting Motor Vehicles Manufacturers Ass'n, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

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carrying the same quantity of oil would mean fewer voyages on which spills might occur.

Moreover, it appears that a comprehensive EIS was prepared in May, 1973, in connection with the CDS *payment* program, which explored in detail the environmental hazards attendant upon, *inter alia*, the transport of crude oil by the very ships now expected to *repay* their subsidies. Since the nature of those hazards is unaffected by the character of the vessels as payee or payor, there seems little point in studying the matter again.

The Secretary's Consideration of Post-Comment Data

During the two-plus years the payback rule lay dormant at congressional direction, the domestic shipping market obviously did not. Oil was shipped from ANS, and data was generated with respect thereto, which were not in anyone's contemplation when the payback rule was first published in 1983. Both plaintiffs and the Secretary draw upon the data to make projections and predictions for the future. The Secretary continues to foresee a decline in shipping costs with some, albeit acceptable, attrition of the least efficient vessels from the Jones Act fleet. Plaintiffs say the figures are considerably more lugubrious: they forebode a glut of tanker tonnage relative to anticipated ANS oil production which will so depress the market that the domestic merchant tanker fleet would unlikely survive the carnage.

Relying upon supporting affidavits submitted with their motions, plaintiffs argue that the Secretary has been led into fundamental misjudgments of fact and policy that public comment would have brought to light; [11] specifically, they contend that the estimates of present costs, charter rates and fuel consumption, as well as predictions of future Alaskan crude oil production found in the Regulatory Impact Analysis ("RIA") of May, 1985, accompanying (but not published with) the payback rule (A.R.

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[11] Defendant-intervenors Atlantic Richfield Co., Moore-McCormack Bulk Transport, Inc., and Yeon Shipping Corp. have moved that the affidavits, being *dehors* the administrative record in these cases, be stricken insofar as they attack the merits of the agency action. While it is true that "judicial review of agency action is normally confined to the full administrative record before the agency at the time the decision was made," *Environmental Defense Fund, Inc.* v. *Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981), the Court may use such extra-record evidence not to examine the propriety of the decision itself, but merely as an indication of the sufficiency of the record before the Secretary when she made it. *Id.* at 286. They may be similarly useful to the court of appeals, and the motion to strike is denied.

2412-2488), were erroneous and led to grossly overstated estimates of savings that could be expected as a result of the rule. Plaintiffs assert that the Secretary's refusal to reopen the comment period in May, 1985, to allow them to expound upon the changed economic conditions, together with her own reliance on data compiled for her alone after the close of the comment period, violates § 553(c) of the APA. *See International Harvester Co.* v. *Ruckleshaus*, 478 F.2d. 615, 649 (D.C. Cir. 1973); *Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375, 393 & n.67 (D.C. Cir. 1973).

As a general proposition, however, a new round of notice and comment is required only where the data relied upon is entirely new and is critical to the agency's determination. *See Community Nutrition Institute* v. *Block*, 749 F.2d 50, 58 (D.C. Cir. 1984) (distinguishing *Portland Cement, supra*). Where subsequent studies or information gathered after close of the comment period merely expand upon or confirm earlier studies' conclusions, or enhance the reliability of earlier data, failure to provide an opportunity for comments on such information is not fatal to the rule it purports to underlie. *Id.*

The Secretary maintains that the data she considered was neither "entirely new" nor "critical," and that, as the information went merely to a "predictive judgment" on her part, the Court should defer to her expertise in any event. She also points out that plaintiffs had the right, and ample opportunity, to submit their own up-to-date information under Department of Transportation regulations had they desired to do so, *see* 49 C.F.R. § 5.27, and that other comments were, in fact, received and considered.

It is, however, immediately apparent that the payback rule published in May, 1985, is identical with the rule published in January of 1983 (save for the repayment terms and the one-year time limit), and the reasons given for it are essentially the same reasons advanced in 1983,

as illuminated by the comments received. It is, thus, clear that the post-record data, whether right or wrong, did not shape the rule but, as the Secretary suggests, the absence of a rule may have shaped the data.

The rule-making process must end at some point. As the court of appeals stated in *ITOC, supra*, when it last remanded to the agency for a resumption of the rule-making proceedings more than three years ago:

> An agency is not obliged to publish a tentative opinion for comment. Otherwise, an absurd and endless process could [ensue]: notice and comment procedures followed by a tentative opinion followed by comment followed by a new tentative opinion (necessary to take account of and respond to the new set of comments) and so on.

690 F.2d at 926. Moreover, in such rulemaking proceedings generally, it is not only entirely permissible for an agency to consult extra-record information to give meaning to that upon which its decisions are based, but

> [i]nterpretation of, and assignment of weight to, data such as these is a task which particularly calls for expert judgment. In interpreting such data and in making predictions based on them, the [agency] must be expected to make use of the experience it has gained through years of dealing with the problem. . . . Frequently, statistics, scientific reports and studies will be amenable to various interpretations and effective regulation requires that the [agency] bring to bear the full range of its knowledge, garnered from whatever source, in making the interpretation on which it bases important policy decisions.

City of Chicago v. *FPC*, 458 F.2d 731, 747 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972) (footnote omitted). In such cases, the object of judicial review is simply "to determine whether a reasoned conclusion from the record as a whole could support the premise on which

the [agency's] action rests. . . . [I]n all cases, reasoned conclusions are the hallmark of regularity." *Id.* at 744.

III.

This Court must also add to its legal obligation to refrain from substituting its judgment for that of the Secretary, *see Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971), its recognition of the fact that the genesis of this particular rule is at least as much Executive Branch policy of the current Administration as it is the product of routine regulatory activity. The Secretary acknowledges that CDS repayment "is consistent with this Administration's pro-competitive, anti-regulatory philosophy," 50 Fed. Reg. 19,172, and that "[i]t is this Administration's position that competition should be relied upon whenever feasible to allocate our nation's transportation resources." A.R. at 2433. Thus, it is the President's—not merely an agency's—policy which the payback rule will implement, unless Congress or the courts should gainsay him. And, from the days of the *Seatrain* case all three branches of government have been aware that the prospect of commingling subsidized and unsubsidized vessels in the domestic trade raises issues as complex as the consequences of their resolution are profound; such questions, being matters of national policy, are best answered by the political branches, not the judicial.

Finally, the payback rule has most assuredly not evolved in obscurity. Congress has thrice put the rule on hold, then ultimately allowed its prohibition to lapse. While it is settled wisdom not to attribute more significance to legislative inertia than is wont, congressional inaction in response to an agency's public declaration of what it intends to do with what it believes its statutory authority to be, particularly when Congress is aware of the controversy attending it, gives credence to the supposition that Congress either approves, or is at least will-

ing that the agency be allowed to try what it proposes. *See North Haven Board of Education* v. *Bell*, 456 U.S. 512, 533-35 (1982); *CBS, Inc.* v. *Federal Communications Comm'n*, 453 U.S. 367, 382-85 (1981); *Planned Parenthood Fed. of America* v. *Heckler*, 712 F.2d 650, 660 (D.C. Cir. 1983).

The Court concludes that the Secretary's reasoning is clear, whether or not it will prove to have been correct, and that the payback rule rationally follows from that reasoning. It concludes, further, that the rule, its historical origins, and its expected consequences have been sufficiently vexed before the courts, Congress, and the agency for nearly a decade, and that no purpose would be served by a remand for further administrative mastication. What plaintiffs might have told the Secretary about the rule or the post-1983 data in the RIA had she reopened the record as they wished, they have now presented in the context of this proceeding, with no perceptible effect on her thinking. She remains committed to the rule as written, and it is for Congress, if anyone, to require that it be altered.

For the foregoing reasons, therefore, it is, this 25th day of October, 1985,

ORDERED, that plaintiffs' motions for summary judgment are denied; and it is

FURTHER ORDERED, that defendant's and defendant-intervenors' motions for summary judgment are granted; and it is

FURTHER ORDERED, that the complaints are dismissed with prejudice.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

APPENDIX D

[50 Fed. Reg. 19,170-78 (May 7, 1985)]

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Maritime Administration

Docket No. 78

46 CFR Part 276

Construction-Differential Subsidy Repayment; Total Payment Policy

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: This rule amends 46 CFR Part 276 which sets forth the Department's policy in considering requests for repayment of construction-differential subsidy (CDS), as authorized under the provisions of the Merchant Marine Act of 1936, as amended. This rule permits the total repayment of construction differential subsidies (CDS) for U.S. tanker vessels provided that full repayment is received by June 6, 1986. Once CDS is repaid, the vessel may be used without restriction in the domestic trade. The amendments are necessary to facilitate CDS payback approvals and, thereby, encourage the development of an efficient and competitive U.S. flag merchant marine by minimizing government obstacles to the marketplace decisions of vessel operators. The rule applies to all tanker vessels with no restriction as to size.

EFFECTIVE DATE: This rule is effective on June 6, 1985.

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The Final Rule

Based on a review of the comments and the new data received, the Department has decided to adopt a final rule, which, in most respects, is identical to the proposal in the January 1983 NPRM. Except as discussed in this final rule and the Regulatory Impact Analysis (RIA), which was prepared in conjunction with its development, the basis for the Department's change in its CDS payback policy remains as set forth in the NPRM. The most important reasons are as follows:

• *Economic efficiency.* The economic benefits of CDS repayment derive basically from the efficiency of the vessels that would be entering the Alaskan oil trades, compared to the older, smaller, less efficient vessels that could be forced into retirement. This greater efficiency would be reflected in oil transport cost savings, which, based on the RIA analysis, total as much as $823 million (net present value (NPV)) in the first ten years.

• *Use of underemployed resources.* CDS repayment would provide full-time employment to the most efficient U.S. tankers, including the six VLCCs which are idle when they are not operating in the ANS trade under six-month permissions. (The seventh VLCC has been employed in the carriage of oil to the Strategic Petroleum Reserve under the Cargo Preference Act, but is currently laid-up.)

• *Increased competition.* By opening up the trade, CDS repayment would increase competition and tend to reduce average tanker rates. The Department believes that additional savings to shippers from this increased competition might reach $2.5 billion NPV through the year 1955.

• *Deregulation.* CDS repayment is consistent with this Administration's pro-competitive, anti-regulatory philosophy. It will eliminate government's role in deciding on six-month permission requests which effectively serves as an entry limiting, anti-competitive mechanism.

• *Equity.* By permitting CDS repayment, the Department would no longer arbitrarily limit repayment to the two Seatrain vessels, which were permitted to repay in 1977 and 1980.

The overall effect of CDS repayment will be a stronger, more viable U.S. merchant marine. In addition to the major reasons mentioned above, the Department also considered the following important impacts in developing the final rule:

• *Effect on Federal revenues.* Repayment by the initial seven VLCC's would provide revenues to the Treasury (including interest) of as much as $277 million. Should additional vessels have their CDS repaid, the U.S. Treasury would receive additional revenues. Offsetting government losses of up to $170 million are possible. Additional savings from reduced ODS payments are possible. DOT also estimated that, at one time, there might have been substantial increased windfall profits taxes (because of decreased transportation costs, oil company net prices would have been higher); however, because of the currently low world oil prices, as adjusted for inflation, there will be no immediate increased windfall profits taxes. If world oil prices were to increase, however, this situation could change.

• *Effects on the environment.* The increased use of larger tankers, which would result from CDS repayment, would reduce the number of port calls and decrease the possible frequency of oil spill incidents.

The Department has made one important change to the NPRM proposal in developing this final rule. The NPRM specified no restriction on the amount of time available to pay back CDS. Based on comments and further consideration by the Department, the final rule includes a one-year time limit after the rule's effective date during which total CDS repayment must be accomplished. A one-year time limit was selected since it provides a rea-

sonable period of time to arrange for necessary financing for those who plan to pay back their CDS. That time limit also minimizes the period of uncertainty regarding future competition that will be faced by those operators of tankers not built with CDS. It will also minimize the period of uncertainty in the shipbuilding industry; after the one-year period, shipbuilders may start receiving new tanker orders since the tanker operators will be better able to predict their new construction requirements.

* * * *

The Rule

PART 276—[AMENDED]

1. The authority citation for Part 276 continues to read as follows:

Authority: Secs. 204(b), 207, 506, and 714, Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b), 1117, 1156, and 1204) Pub. L. 86-518 (74 Stat. 216); Reorganization Plans No. 21 of 1960 (64 Stat. 1273) and No. 7 of 1961 (75 Stat. 840), as amended by Pub. L. 91-469 (84 Stat 1036); and Dept. of Commerce Organization Order 10-8 (36 FR 19707), July 23, 1973), unless otherwise noted.

2. 46 CFR 276.3 is revised to read as follows:

§ 276.3 Total repayment.

(a) In accordance with the terms and conditions of this section and upon receipt of an appropriate application, the Maritime Administration will allow the total repayment of unamortized construction differential subsidy (CDS), with interest, and rescind permanently the domestic trading restrictions related to the grant of CDS for tankers of any deadweight tonnage. Approval of total repayment shall be irreversible. The full repayment amount must be received by June 6, 1986.

(b) *Repayment Terms.* The full repayment amount should consist of the unamortized CDS, as determined by the Maritime Administration, with compounded interest on that amount. The interest rate will be the same as the long-term interest rate the owner obtained, or would have obtained if long-term debt financing had been used, in financing his/her portion of the tanker. Unless the Maritime Administrator determines that using interest rates other than long-term bond rates is justified, such rates will be used. If more than one long-term bond was issued to finance the owner's portion of a specific tanker, or if one or more of such bonds has more than one rate (such as a serial bond) an average interest rate will be computed weighted by the proportion of each bond par value to the total par value of all long-term bonds issued to finance the owner's tanker. The interest payable on the unamortized CDS shall be computed by continuous compounding of the interest until the day of repayment. For purposes of this paragraph, "long-term bond rates" are either actual Title XI bond rates on a specific owner's tanker or the Title XI long-term bond rate at the time the tanker's statutory life began.

Issued in Washington, D.C., on May 3, 1985.

Elizabeth Hanford Dole,

Secretary of Transportation.

APPENDIX E

[48 Fed. Reg. 4408-14 (Jan. 31, 1983)]

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

46 CFR Part 276

Docket No. 78

Construction-Differential Subsidy Repayment;
Total Repayment Policy

AGENCY: Department of Transportation (DOT), Office of the Secretary (OST).

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This notice proposes to amend 46 CFR Part 276 which sets forth the Department's policy in considering requests for repayment of construction-differential subsidy (CDS), as authorized under the provisions of the Merchant Marine Act of 1936, as amended. The proposed amendments are necessary to facilitate CDS payback approvals and, thereby, encourage the development of an efficient and competitive U.S. flag merchant marine by minimizing government obstacles to the marketplace decisions of vessel operators. The rule, as proposed herein, would apply to all tanker vessels. However, comment is also invited on limiting the rule to tankers of at least 100,000 deadweight tons (DWT) or some lower weight.

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Rationale for this Proposal

The Department believes, for a number of reasons, it is now necessary to promulgate a permanent rule. Basically, the Department's proposal would allow tankers of any size presently operating in the foreign trade and

constructed with CDS funds to enter and operate in the Jones Act trade upon total repayment of the unamortized CDS amount owing. For reasons discussed later, the Department is specifically requesting comments on whether the rule should be limited to larger tankers.

Adoption of this proposal would be consistent with the policies of the Act. It is the policy of the United States to foster the development and encourage the maintenance of the U.S. merchant marine. To effectuate this policy, it is most important that an efficient and competitive domestic merchant marine be encouraged, primarily by allowing it to compete freely in the commercial marketplace. Only in that way can a merchant marine sufficient to meet the objectives of the Act be guaranteed. Accordingly, if they are to succeed, the promotional and regulatory policies of the Federal government should minimize government interference in the marketplace decisions of vessel operators.

Adoption of this proposed rule would also be consistent with the Supreme Court's holding in *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, *supra*. In reaching its decision, the Supreme Court carefully examined the Act and its legislative history. It concluded that a permanent release from domestic trading restrictions granted to CDS vessels is consistent with the purpose of the Act. It also specifically recognized the inherent benefits of a vessel's permanent release over temporary releases authorized by section 506 of the Act. The court stated

> Section 506 . . . permit[s] a vessel that enjoys the benefits of a CDS to operate outside the foreign market only in narrow circumstances, generally upon a highly discretionary administrative decision, and for no more than six months a year. And we have no doubt that it would be flatly inconsistent with the congressional intent were the Secretary or this court to conclude that a temporary release not meeting

> these conditions was proper. But a permanent release upon full repayment is quite different. It irrevocably locates the vessel in the unsubsidized fleet and, thus, poses no danger of a supercompetitor skimming the cream from each market. It creates no long-term instability. And it confers no windfall. On the contrary, at least where repayment of the CDS includes some amount reflecting capital costs which would have been incurred had no subsidy been available, such a transaction merely permits a once subsidized vessel to enter the domestic trade on a footing equal to that of vessels already in that trade. It was not the purpose of the Act to prohibit such entry . . . . Id. at 589-90.

The Supreme Court's analysis confirms that allowing a permanent release of domestic trading restrictions in exchange for full repayment of CDS over the long term is preferable to *de facto* government regulation of capacity in the domestic trade by reason of the issuance of temporary and highly discretionary waivers under section 506 of the Act. The permanent entry of a vessel into these trades allows existing operators to adjust their operations to meet new market conditions. On the other hand, the temporary entry of vessels into the trade under section 506 of the Act subjects the relevant market to the exercise of the Maritime Administration's discretion, thus increasing instability and the inefficient allocation of capacity in the trade.

Further, the denial of an application for permanent release of domestic trading restrictions in exchange for full repayment of CDS may keep a vessel from being employed in a market where it is most efficient. This hardly can be considered to be consistent with the policies of the Act. Nowhere in the Act does it provide that less efficient operators are entitled to protection in the markets in which they operate.

Economically, promulgation of the proposed rule is fully justified. Its benefits outweigh its costs. There are fifteen CDS-built tankers that could be expected to repay their CDS with interest and enter the Alaska North Slope (ANS) trade full-time under the proposal. (ANS oil production was initiated by opening of the Trans-Alaska Pipeline System and has created an increased demand for U.S. flag tankers.) The section 506 waiver process is inadequate to meet the demand.

Included in the fifteen are seven very large crude carriers (VLCC's) of over 1.8 million DWT and eight tankers of approximately 90,000 DWT each. These tankers are among the most efficient U.S. flag tankers. If allowed into the domestic market on a permanent basis, they would add 1.6 million DWT of additional ANS tanker capacity (taking into consideration existing waivers). Removal of regulatory restrictions, in addition to providing for full-time and permanent use of our efficient tankers, would increase ANS oil trade competition and reduce the costs of oil transportation. Additional benefits of the rule could be up to an estimated $200 million in cash, in CDS plus interest, repaid to the U.S. Treasury, and the increased probability of Title XI government loan guarantee repayment for the CDS-built tankers entering the ANS trade.

CDS repayment would not adversely affect the employment opportunities of unsubsidized VLCC's or unsubsidized tankers weighing 90,000 DWT. Unsubsidized tankers in the 100,000 to 130,000 DWT category could be affected, but they are, generally, relatively new tankers with reasonable prospects for ANS employment even with the added competition of CDS-built tankers.

If this proposal is adopted, the major impact of CDS repayment would fall on those tankers weighing 80,000 DWT and under. There are approximately 20 such tankers, all owned or chartered to oil companies in the

ANS trade. These oil companies will be faced with the choice of chartering the CDS built tankers at lower rates and redeploying their less efficient tankers to other trades or simply retaining their tankers in the ANS trade and using CDS-built tankers for the additional demand.

The rate structure of the ANS trade would also be benefitted by adoption of this proposal. Presently, the tanker rates range from $7.25-$16.50/DWT/month for tankers ranging in size from 80,000-170,000 DWT. This rate structure has been significantly affected by *de facto* capacity "regulation" of the ANS trade. Since domestic market entry is restricted, rates are maintained at an artificially higher level than otherwise would be true if the market entry restrictions were removed.

The proposal would also assist in reducing the Title XI exposure. This reduction would occur when a Title XI vessel that is unable to secure full-time employment is put into a market where full-time employment is attainable.

By 1988, there will be 138 unsubsidized tankers, 20 years or older in age, with over 4.7 million DWT of capacity and no Title XI debt. If CDS repayment is permitted, up to 15 large, efficient tankers could be added to the unsubsidized tanker fleet, representing 2.5 million DWT of capacity (0.9 million DWT of the present temporary waiver capacity and 1.6 million DWT of additional capacity) in the ANS trade. These tankers would have much improved ANS full time trading prospects, and the overall Title XI exposure on these vessels would be significantly reduced.

The benefits of this proposal lie, in part, in securing employment for CDS tankers that have been unable to maintain employment in the foreign trade. CDS built VLCC's have garnered the most six month waivers, with 90,000 DWT tankers also obtaining a few waivers. With the additional spectre of significantly fewer opportunities to operate in the Strategic Petroleum Reserve (SPR) fill program, both types of tankers will have even greater

difficulty securing employment in the future unless CDS repayment is allowed. CDS repayment would allow these vessels to seek full-time employment in the ANS trade and in that way maximize the usefulness of the most efficient tankers in the U.S. fleet.

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Accordingly, it is proposed to amend 46 CFR § 276.3 to read as follows:

§ 276.3 *Total repayment*

(a) In accordance with the terms and conditions of this section and upon receipt of an appropriate application, the Maritime Administration will allow the total repayment of unamortized construction differential subsidy (CDS), with interest, and rescind permanently the domestic trading restrictions related to the grant of CDS for tankers of any deadweight tonnage. Approval of total repayment shall be irreversible.

(b) *Repayment Terms*

The interest rate will be the same as the long-term interest rate the owner obtained, or would have obtained if long-term debt financing had been used, in financing his/her portion of the tanker. Unless the Maritime Administrator determines that using interest rates other than long-term bond rates is justified, such rates will be used. If more than one long term bond was issued to finance the owner's portion of a specific tanker, or if one or more of such bonds has more than one rate (such as a serial bond) an average interest rate will be computed weighted by the proportion of each bond par value to the total par value of all long term bonds issued to finance the owner's tanker. The interest payable on the unamortized CDS shall be computed by continuous compounding of the interest until the day of repayment. For purposes of this paragraph, "long term bond rates" are either actual Title XI bond rates on a specific owner's tanker or the Title

XI long-term bond rate at the time the tanker's statutory life began.

Authority: Sections 204(6), 207, 506, and 714, Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b) 1117, 1156, and 1204 Pub. L. 86-518 (74 Stat. 216).

Issued in Washington, D.C. on Jan. 27, 1983

/s/ Andrew L. Lewis
ANDREW L. LEWIS
Secretary of Transportation

APPENDIX F

SUBSIDIARIES AND AFFILIATES OF PETITIONER ATLANTIC RICHFIELD COMPANY

Agro Internacional, S. de R. L. de C.V.
Alyeska Pipeline Service Company
Anamex Mining Company
Arco Solar Nigeria Ltd.
A/S Skaland Grafitverk
Badger Pipe Line Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
Colonial Pipeline Company
Compania de Petroleo Ganso Azul, Ltda.
Compania Minera dos Republicas, S.A. de C.V.
Cook Inlet Pipe Line Company
Dixie Pipeline Company
East Texas Salt Water Disposal Company
85819 Canada Limited
Eisenhower Mining Company
Industria Nacobre, S.A. de C.V.
Iricon Agency Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Company
Las Quintas Serenas Water Company
Logan Aluminum Inc.
Nihon Oxirane Company, Ltd.
Nordisk Mineselskab A/S
P. T. Elnusa Chemlink
Platte Pipe Line Company
Prince Consolidated Mining Company
Rodman, Inc.
Sinclair Venezuelan Oil Company
Smokehouse Copper Mining Company
Sumiarco Company Limited
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company